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CITATIONS

480-483—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL–CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–11a) is reported at 446 F. 2d 369. The decision and order of the National Labor Relations Board (App. C, *infra*, pp. 13a–19a) are reported at 187 NLRB No. 90.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 12a) was entered on June 29, 1971. On September 20, 1971, Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to and including November 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who resigned from union membership and then returned to work during a lawful union-authorized strike, and by seeking judicial enforcement of the fines.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
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> * * * * *
>
> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 20, 1965, the Company [1] and the Union,[2] which represents the Company's production and maintenance employees, executed a collective bargaining agreement for a three-year term. The agreement contained a maintenance-of-membership clause providing that employees who were union members when the contract was executed, or who joined the Union during the contract term, were, as a condition of continued employment, to remain members in good standing "as to payment of dues" for the duration of the contract (A. 6–7; 39, 91).[3] Neither the contract nor the Union's constitution contained any provision defining or limiting the circumstances under which a member could resign from the Union (A. 7–8, 23; 57–59, 77, 96–98).

On September 14, 1968, six days before the scheduled expiration of the collective bargaining agreement, the union membership voted to strike if no agreement was reached by September 20. No agreement was reached, and the strike, with attendant picketing, began on that day (A. 4–5; 42, 48).[4] On September 21,

[1] International Paper Box Machine Company.

[2] Granite State Joint Board, Textile Workers Union of America, AFL–CIO.

[3] "A." refers to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk.

[4] All of the approximately 160 union members in the unit went out on strike. The plant remained open, but only supervisors, clerical, office, and technical employees, and the 3 or 4 employees in the unit who were not union members worked (App. C, *infra*, p. 22a).

the Union held a meeting to discuss strike organization, at which the membership approved a resolution that anyone aiding or abetting the Company during the strike would be subject to a $2000 fine (A. 5; 41, 48, 92).[5]

On November 5 and 25, respectively, employees Felix Radziewicz and Maurice Kimball mailed to the Union letters of resignation from union membership. The Union wrote each employee, in reply, that it considered their purported resignations to be ineffective, and that they would be subject to a fine of $2000 if they crossed the picket line (A. 5–6; 49, 93–95, 119, 126). Despite the warning, both employees returned to work. Beginning about 7 months later and during the period from May 9 to September 19, 1969, 29 other employees also resigned from the Union and returned to work (A. 21, 63–64, 88, 111–130).

After the 31 employees returned to work, the Union sent each a letter charging him with misconduct by crossing its picket line, and requesting him to appear at a hearing at a specified time to answer the charge (A. 21; 88, 109–110). None appeared. The Union tried the 31 employees *in absentia*, and then notified each employee that he had been found guilty and had been fined the equivalent of a day's wages for each day worked during the strike, the fines being payable im-

[5] Most of the members, including the employees involved here, attended both the September 14 and the September 21 meetings. The members assented to the strike by a standing vote, with only one member dissenting. The motion to levy the fine was adopted unanimously without debate. (A. 5; 40–41, 48–49.)

mediately (A. 21; 88, 132). Later, the Union sent each employee a letter threatening legal action to collect the fine (A. 21; 131). When none of the employees paid, the Union filed suits in a New Hampshire state court to collect the fines (A. 21–22; 88, 133–144). The employees, in turn, filed unfair labor practice charges with the Board.*

B. THE BOARD'S DECISION AND ORDER

The Board concluded that the 31 employees had effectively resigned from the Union before returning to work, and that the Union violated Section 8(b)(1)(A) of the Act by fining them and seeking judicial enforcement of the fines (App. C, *infra*, pp. 13a–19a). The Board relied upon its earlier decision in *Booster Lodge No. 405, IAM (The Boeing Company)*. 185 NLRB No. 23 (1970) (App. D, *infra*, pp. 55a–70a). There, the Board held that the Union's right to fine a member for crossing a picket line during a strike recognized in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, is extinguished by the member's effective resignation from the Union before crossing the line. The Board reasoned (App. D, *infra* pp. 61a–62a):

> In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right. But the contract between the

*The state court suits are being held in abeyance pending the outcome of the Board proceeding.

> member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished. [Footnote omitted.]

The Board ordered the Union, *inter alia*, to rescind the fines and to withdraw the state court suits (App. C, *infra*, p. 16a, 17a, 49a–51a).

C. THE COURT OF APPEALS' DECISION

The court of appeals denied enforcement of the Board's order. The court acknowledged that neither the Union constitution nor the expired collective agreement precluded the employees from resigning from the Union when they did. It accepted, however, the Union's contention that "even if the resignations effectively severed ties with the union for most purposes, the September 1968 strike vote bound these thirty-one employees to support this particular strike until its conclusion" (App. A, *infra*, p. 6a). The court reasoned that, "although § 7 gives an employee the right to refuse to undertake and involve himself in union activities, it does not necessarily give him the right to abandon these activities in midcourse once he has undertaken them voluntarily" (App. A, *infra*, p. 8a). The court concluded (App. A, *infra*, pp. 8a–9a):

> [T]he policy of allowing unions to maintain strike discipline [recognized in *Allis-Chalmers*, *supra*] can be reconciled with the policy of allowing employees to refrain from concerted activities if the Act is interpreted to permit the waiver of § 7 rights by employees. Under this interpretation, employees who agreed to under-

take specific union activities and obligations would be held to have waived their § 7 rights to refrain from those activities * * *. [Footnote omitted.]

REASONS FOR GRANTING THE WRIT

The question whether a union may assess a fine against a former union member for returning to work after resigning from the union during a union-authorized strike, and may seek judicial enforcement of the fine, is an important and recurrent issue in the administration of the Act. The holding of the court of appeals that the employee's acquiescence in the initial strike authorization bars him from resigning from the union and returning to work seriously impairs the employee's right under Section 7 to refrain from participating in and assisting union activities. Review by this Court is thus warranted.

1. In *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court held that a union did not violate Section 8(b)(1)(A) of the Act by fining members who went to work during a lawful strike authorized by the membership, and by seeking to enforce the fines through court suit. The Court noted that the proponents of Section 8(b)(1)(A) repeatedly had stated during congressional consideration of the provision that there was no intent to interfere with the internal affairs of unions. It also noted that "[p]rovisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, * * * were commonplace at the time of the Taft-Hartley amendments." 388 U.S. at 181–182.

These two factors, it concluded, showed that Congress had not intended to deprive unions of the power to punish strikebreaking members when it forbade unions to "restrain and coerce" workers in the exercise of their Section 7 rights "to refrain from any or all [union] * * * activities * * *." In upholding judicial enforcement of the fines, the Court observed that "Congress was operating within the context of the 'contract theory' of the union member relationship * * *" and the usual way to enforce a contract is in court (388 U.S. at 192).

In *Scofield v. National Labor Relations Board*, 394 U.S. 423, the Court held that a union did not violate Section 8(b)(1)(A) by fining members who exceeded a production quota established by union rule but acquiesced in by the employer. The Court reasoned that "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" *Id.*, at 430, emphasis supplied.[1]

These decisions indicate that, in applying Section 8(b)(1)(A), the Board is required to make an accommodation between the right of the union "to protect

[1] The court added: "If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work, at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to promote." 394 U.S. at 435.

against erosion its status [as exclusive bargaining representative] through reasonable discipline of members who violate rules and regulations governing membership" (*Allis-Chalmers, supra,* 388 U.S. at 181), and the right of employees, conferred by Section 7, "to refrain from" engaging in union activity. They further indicate that the union's right of discipline flows from the fact that, in joining the union, the member agrees to abide by lawful union rules and policies, and that a member may escape the discipline by leaving the union.

The very fact that a worker gives up so much freedom of action by joining a union (*Allis-Chalmers, supra,* 388 U.S. at 180) supports the conclusion of *Scofield, supra,* that he must ultimately have the right to leave the union if he finds some aspect of its regulations intolerable. In this case the union's constitution and bylaws contained no restriction of members' rights to resign and the retention of membership provision of the collective bargaining agreement had expired with the agreement (App. A, *infra,* p. 5a). The Board was reasonable in concluding that the members had a right to resign from the union and that the union's right of discipline was coterminous with the union-member relationship.*

2. The court of appeals did not decide whether Section 7 afforded the workers a right to resign their membership and return to work, because it

* In *Boeing, supra,* the Board found that the union did not violate Section 8(b)(1)(A) by fining former members who had contravened the union policy *prior* to their resignation from the union. App. D, *infra,* pp. 64a–66a.

found that they had "waived" their Section 7 rights in voting to strike (App. A, *infra*, pp. 8a–9a). The court of appeals "waiver" theory imposes a cost upon a member's prior support of the union's policy far beyond anything contemplated at the time the member gave the support. While a member's support of any rule or policy, such as increased dues or assessments, may be viewed as a waiver of any right to oppose the rule, it can hardly be viewed as a commitment to remain a member or support the rule (*e.g.*, pay dues) after he has resigned. Support at one time of a particular union project should not be construed in derogation of Section 7 rights, so as to commit a member irrevocably to union membership or to support of the policy once he has left the union.[9]

The qualification of Section 7 rights announced by the court of appeals—that a vote for a strike bars the right to resign from the union and abandon that policy—seriously curtails the employees' Section 7 right to refrain from engaging in union activity, and introduces a factor which often cannot be established. While an employee may be sympathetic to a strike when the vote is taken, events occurring thereafter—such as the hardship to his family or the employer's ability to hire permanent replacements for the

[9] The court noted that, "[a]bsent an express provision to the contrary, the courts have interpreted union constitutions to allow voluntary resignations at any time." Similarly, "since the collective bargaining agreement had expired, the 'retention of membership' provision was no longer in effect during the strike." (App. A, *infra*, p. 5a).

strikers may lead him to change his mind about the strike and to desire to return to work. Under the Board's view of the proper balance between the rights of the union and those of the employee, Section 7 gives the employee the right to make this change without running the risk of union discipline, provided that he is willing effectively to resign from the union before abandoning the strike. The decision of the court of appeals, on the other hand, would deprive the employee, once he voted for the strike, of the freedom to change his mind in the light of ensuing events; he would be bound to support the strike to its conclusion, irrespective of the hardship which this course would impose on him."[10]

Moreover, the attempt to ascertain whether an employee originally voted for a strike will be difficult, if not impossible. Where, as here, the employees voted openly, it is not always clear how many employees voted and how,[11] and to take testimony on this issue,

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[10] Here, the first two strikers to resign from the Union did so 1½ to 2 months after the strike had begun. The other 29 did so 7½ to 12 months after its commencement (A. 45, 71, 90, 93, 111–130).

[11] The court below noted that the "only direct evidence on the record before us is the testimony of Maurice Kimball II, who was the second employee to resign"; he "testified that he had voted for the strike and that he was present at the meeting when the fine was voted, and did not oppose it" (App. A, *infra*, p. 3a, n. 2). The court added that, "[s]ince the record is somewhat equivocal on this point, * * * it is conceivable that one or more employees will yet come to the Board with the claim that they did not attend either of the two strike meetings" (App. A, *infra*, p. 10a, n. 8).

long after the event, would be of little probative value. Cf. *National Labor Relations Board* v. *Gissel*, 395 U.S. 575, 608. On the other hand, where the strike vote is by secret ballot, as many are, a probe as to how the employees voted, although possible, would impair the secrecy of the ballot.

Finally, the holding of the court below substitutes the court's judgment for the Board's as to how the competing interests of the union and the employees should be accommodated. By thus usurping the Board's "function of striking that [delicate] balance to effectuate national labor policy [which] is often a difficult and delicate responsibility" (*National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96), the court below has exceeded its limited reviewing authority and has encroached upon a function Congress committed to the Board.

3. The importance of the issue is attested by the fact that there are two other enforcement proceedings pending involving this question. *Booster Lodge No. 405, IAM* v. *National Labor Relations Board*, Nos. 26847 and 24744 (C.A. D.C.), argued September 15, 1971; *Local 1285, IAM* v. *National Labor Relations Board*, No. 71-1578 (C.A. 5), argued November 15, 1971. The present case squarely presents the issue, and in view of its importance in the Administration of the Act, there is no occasion to await the possible conflict between circuits that could arise as a result of the forthcoming decisions in the pending cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
NORTON J. COME,
Assistant General Counsel,
WARREN M. DAVISON,
Deputy Assistant General Counsel,
STANLEY R. ZIRKIN,
Attorney,
National Labor Relations Board.

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